IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES LITIGATION	MDL 1446
This Document Relates To: MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. ENRON CORP., et al., Defendants.	Consolidated, Coordinated and Related Civil Actions Case No.: H-01-CV-3624
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. KENNETH L. LAY, et al., Defendants.	

BANK DEFENDANTS' MOTION TO LIFT
DEFENDANT KENNETH RICE'S STAY OF DISCOVERY

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The Bank Defendants[1] respectfully move this Court to lift the blanket stay of discovery currently afforded to Defendant Kenneth Rice. On July 30, 2004, Mr. Rice pled guilty to securities fraud arising out of his conduct as the former Chief Executive Officer of Enron Broadband Services ("EBS"). The reason for Mr. Rice's stay of discovery in these actions has therefore dissipated. The need of the Defendants to obtain timely discovery now outweighs any legitimate interest Mr. Rice has in further postponing his discovery obligations.

BACKGROUND

Central to the Bank Defendants' defense of this action is timely discovery concerning the reasons for Enron's demise. Enron collapsed as a result of multiple business failures whose effects were magnified and compounded by the fraudulent activities of Enron insiders. Mr. Rice, a key Enron insider, has now admitted his role in Enron's demise. One of Enron's principal business failures was the inability of Mr. Rice's EBS to develop and deliver a promised fiber-optic network and the software applications intended to make Enron an Internet pioneer.

To date, because of existing stays, the Bank Defendants have been denied the depositions of the key individuals who managed and ruined Enron. In addition to Mr. Rice, who

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[1] For purposes of this motion, the "Bank Defendants" are Citigroup Inc., Citibank, N.A., Citigroup Global Markets Inc. (formerly Salomon Smith Barney Inc.) and Citigroup Global Markets Ltd. (formerly known as Salomon Brothers International Limited), JPMorgan Chase & Co., JPMorgan Chase Bank, JPMorgan Securities, Inc., Bank of America Corp., Banc of America Securities LLC, Bank of America, N.A., Barclays PLC, Barclays Bank PLC, Barclays Capital Inc., Credit Suisse First Boston LLC, Credit Suisse First Boston (USA), Inc., Pershing LLC, Merrill, Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Canadian Imperial Bank of Commerce, CIBC World Markets Corp., CIBC Inc., Deutsche Bank AG, Deutsche Bank Securities Inc., Deutsche Bank Trust Company Americas, Lehman Brothers Holdings Inc., Lehman Brothers Inc., and Lehman Brothers Commercial Paper Inc.

is the subject of this motion, many of the other central figures in Enron's collapse presently enjoy indefinite stays of discovery pending criminal proceedings against them.[2]

The initial orders granting discovery stays were issued in the Spring of 2003, when the commencement of depositions was still more than a year away. In justifying these stays, the Court indicated that "the stay should not be long." #1298 at 22 (granting stay in favor of Andrew Fastow, incorporated by reference into #1468).[3] That expectation has unfortunately not come to pass. To date, none of the Enron criminal actions has gone to trial and the sentencings of many of the Enron defendants who pled guilty have been repeatedly delayed.[4]

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2 Additional persons who have sought and received a postponement of discovery pending completion of criminal proceedings against them include Andrew Fastow, Enron's former Chief Financial Officer, who is regarded as the architect of the Raptors and other fraudulent financial manipulation and for which he has pled guilty; Michael Kopper, Fastow's lieutenant who has also pled guilty to fraud for his conduct at Enron; Richard Causey, Enron's former Chief Accounting Officer responsible for the financial statements that are alleged to have misled the plaintiffs; and Joseph Hirko and Kevin Hannon, other executives at EBS.

3 Following Enron's collapse and bankruptcy, plaintiffs named Mr. Rice as a defendant in *Newby*. On April 29, 2003, Mr. Rice was criminally charged on several counts, including securities fraud, in a Superseding Indictment filed in the Southern District of Texas. Shortly thereafter, Rice filed in this action a motion to postpone all discovery against him during the pendency of his criminal proceedings. #1456. In an order dated June 6, 2003 (#1468), this Court granted Rice's motion for the reasons stated in this Court's orders dated March 25, 2003 (#1298) and April 29, 2003 (#1353), which similarly stayed discovery against Defendant Andrew Fastow. (Although the Court incorporated by reference only its April 29, 2003 order (#1353) in the decision regarding Rice, the April 29 order addressed only Defendant Fastow's motion to stay an answer to plaintiffs' Consolidated Complaint. Therefore, we also assume the Court intended to incorporate its March 25, 2003 order (#1298), in which the Court granted Fastow a stay with respect to discovery.)

4 For example, Michael Kopper entered his guilty plea in August 2002 and has not yet been sentenced – *two years later*. Andrew Fastow pled guilty in January 2004 and, although he was originally scheduled to be sentenced in April 2004, that date has been postponed. Six other former Enron employees who pled guilty to charges stemming from their employment at Enron have been awaiting sentencing from between three and twenty-two months. Former Arthur Andersen partner David Duncan pled guilty in April 2002 and

Notwithstanding these stays, the fact discovery schedule moves forward toward a November 30, 2005 deadline. Because the mechanics of deposition scheduling in a case involving so many parties is complex, this deadline is closer than it appears. The parties have begun to schedule the fifth of an anticipated sixteen deposition cycles.

Postponing the depositions of all of the key Enron insiders until near the end of the fact discovery period will not work. Such a backlog of important witnesses will certainly wreck the current schedule.[5] Aside from the difficulty of scheduling all of those witnesses, the Deposition Protocol restricts depositions in a way that would make the task impossible. Only five witnesses may be deposed per day and only one "extended time" witness is permitted per week (and one can reasonably assume that given their importance all of the individual defendants protected by discovery stays will be "extended time" witnesses). Moreover, if the Bank Defendants are not permitted to ask questions of witnesses like Mr. Rice soon, they will be denied the opportunity to use the testimony of these witnesses to conduct appropriate follow-up discovery.

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yet his sentencing has repeatedly been postponed. Although Mr. Rice nominally has been given a sentencing date of January 30, 2005, this pattern strongly suggests that his sentencing may be continued indefinitely beyond that date.

[5] In the initial three-month period of depositions from June to August 2004, the Defendants nominated fifteen Enron witnesses, yet only five of those witnesses were actually deposed in that time period. Of the ten deferred nominations, the depositions of five witnesses, all of whom are former Enron employees, were delayed due to objections filed by the Department of Justice. The depositions of the five remaining witnesses have been delayed or postponed for a variety of reasons ranging from the scheduling conflict of a witness's counsel to the failure of certain witnesses to cooperate in scheduling a date.

In sum, if the Bank Defendants are to be afforded a meaningful opportunity to take discovery from the people at the center of Enron's collapse, the Court should re-evaluate the indefinite stays presently granted to these individual defendants. Therefore, the Bank Defendants respectfully request that the first step should be for the Court to lift the Rice stay.

ARGUMENT

It is well-settled that the Constitution does not mandate a stay of discovery for Mr. Rice or any other defendant in this civil action simply because they face criminal charges arising out of the same facts. *See Hoover v. Knight*, 678 F.2d 578, 581 (5th Cir. 1982) ("Many cases have held that parallel criminal and civil trials or investigations do not raise questions of constitutional magnitude with respect to the privilege against self-incrimination."). *See also SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980); *Arden Way Assocs. v. Boesky*, 660 F. Supp. 1494, 1496 (S.D.N.Y. 1987). Rather, as this Court has already recognized, it has discretionary authority to stay discovery from these defendants. #1298 at 11. In previously exercising this discretion with respect to Mr. Rice, the Court applied a "balancing-of-interests approach" set forth by the Fifth Circuit and concluded that, at the time of his motion, Mr. Rice's interest in avoiding self-incrimination outweighed other parties' interests in obtaining discovery from him. *See, e.g., Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1088 (5th Cir. 1979). Now that Mr. Rice has pled guilty to a fraud in which he admits to having inflated Enron's stock price by misrepresenting the state of EBS, the balance of interests has dramatically tipped in favor of lifting the stay.

Generally, a court considers the following factors in deciding whether a stay of discovery in favor of a party to a civil proceeding is warranted in light of criminal proceedings against that party: (1) the status of the criminal case; (2) the private interests of the parties

seeking discovery in proceeding expeditiously weighed against the prejudice to them caused by the delay; (3) the private interests of, and burden on, the party resisting discovery; (4) the public interest; (5) the interests of the Court; and (6) the extent to which the issues in the criminal case overlap with those presented in the civil case. *See Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995); *see also Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 902-03 (9th Cir. 1989). "[W]hile a trial court should strive to accommodate a party's Fifth Amendment interests, it also must ensure that the opposing party is not unduly disadvantaged." *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (5th Cir. 1996). Each of these factors weigh in favor of lifting Mr. Rice's stay now.

A. The Status of the Criminal Case

Mr. Rice has now pled guilty to securities fraud in his criminal case. *See* Cooperation Agreement, Ex. A ¶ 2, *United States v. Rice*, No. CR-H-03-93-01 (S.D. Tex. 2004) ("Plea Agreement") (Appendix, Ex. 1). Therefore, the status of Mr. Rice's criminal case favors lifting the stay because Mr. Rice no longer fears criminal prosecution on matters relating to the admissions he has made in his plea agreement. *See Arden Way*, 660 F. Supp. at 1499 (denying stay of responsive pleading where the moving party had already been indicted and entered into a plea agreement with the government, but had not yet been sentenced). *See also Karimona Inv., LLC v. Weinreb*, No. 02-CV-1792, 2003 WL 941404, at *5 (S.D.N.Y. Mar. 7, 2003) (refusing to stay defendant's deposition where he had previously withdrawn a guilty plea and there was no indictment currently pending against him); *Donahey v. Childs Equip. Co.*, 812 F. Supp. 566, 567 (W.D. Pa. 1992) (discovery stay lifted when defendant entered a guilty plea).

B. The Parties' Private Interests

1. Mr. Rice's Interests

The balance of interests in maintaining a stay against all discovery from Mr. Rice changed on July 30 when Mr. Rice voluntarily pled guilty to securities fraud and admitted that the purpose of his fraud "was to falsely portray EBS as a successful venture and, in turn, to positively influence Enron's stock price." Plea Agreement, Ex. A ¶ 8. Having pled guilty to criminal charges while still facing civil liability for the same alleged fraud and violation of securities laws, Mr. Rice "substantially decreas[ed] if not extinguish[ed] the risk of his further prosecution." *Arden Way*, 660 F. Supp. at 1497. In the Plea Agreement, the Department of Justice has committed that "no further criminal charges will be brought against [Rice] for any act or offense in which he engaged in his capacity as an officer and employee of Enron." Plea Agreement ¶ 10. Notably, the Department of Justice has agreed to forego further prosecution of Mr. Rice for "*any act or offense*" in which he engaged while an employee at Enron, not just for the facts encompassed within Mr. Rice's guilty plea. Therefore, Mr. Rice cannot be heard to say that giving discovery in this case on facts or issues not explicitly embodied within his Plea Agreement will subject him to the danger of self-incrimination. Moreover, because the Department of Justice has agreed that it will "move to dismiss the remaining counts of the Fourth Superseding Indictment and any underlying indictments with prejudice" *id.*, Mr. Rice bears no risk of self-incrimination on those additional charges.

2. The Bank Defendants' Interests

While Mr. Rice's interest in maintaining the stay has substantially diminished due to his guilty plea, the Bank Defendants' interest in obtaining discovery from Mr. Rice has increased demonstrably since the stay was issued over a year ago. As the Court is aware,

discovery in *Newby* is proceeding apace and the longer Mr. Rice's stay remains in place, the more substantial the prejudice to the Bank Defendants. That is because EBS's failure plays a fundamental role in the demise of Enron and the damages purportedly suffered by plaintiffs.

According to the indictment that forms the basis for Mr. Rice's guilty plea, Enron first entered the telecommunications market in 1997 following its purchase of Portland General Electric ("PGE"), an Oregon electric utility, which also included FirstPoint Communications ("FirstPoint"), a small telecommunications unit of PGE that was building a fiber-optic loop around Portland, Oregon and its suburbs. FirstPoint was later renamed Enron Broadband Services. *See* Fourth Superseding Indictment ¶ 3, *United States v. Rice*, No. CR-H-03-93-01 (S.D. Tex. July 22, 2004) ("Indictment") (Appendix, Ex. 2).

In the summer of 1999, Enron announced that EBS would become a "core" Enron business and a major part of Enron's overall business strategy. *Id.* ¶ 15. Enron announced to industry analysts that it planned to build a national fiber-optic network "backbone" on which it would sell wholesale broadband capacity to Internet and phone companies. In addition to building out its fiber optic network, EBS devised the concept of an Enron Intelligent Network ("EIN"). The EIN was intended to be an "advanced, software-driven 'intelligent' telecommunications network" that would be capable of delivering advanced software applications, including media streaming, video transport services, and video conferencing. *See id.* ¶ 12.

In June 1999, Mr. Rice joined EBS and served as its CEO from approximately July 1999 to July 2001. In November 1999, Mr. Rice and other Enron and EBS management decided to make EBS the "centerpiece of Enron's annual presentation to equity analysts, scheduled for January 20, 2000." *Id.* ¶ 15. As CEO of EBS, Mr. Rice and others at EBS and

Enron, including Messrs. Hirko and Hannon (who also currently enjoy stays of discovery), made fraudulent statements to deceive the investing public and others about the technological capabilities, value, revenue and business performance of EBS. *Id.* ¶ 11. Mr. Rice has now admitted to engaging in that fraud. *See* Plea Agreement, Ex. A ¶ 2.

In his plea agreement, Mr. Rice admits the fact that none of the features intended to give EBS a competitive advantage actually existed:

> I, together with others, conspired to falsely claim . . . that EBS had developed revolutionary network control software that, among other things, allowed the company to provide differentiated quality of service, dynamic provisioning of bandwidth and usage-based metering and billing, features that, if they had existed, would have been unique in the industry and given EBS a significant competitive advantage.

Id. ¶ 5. Mr. Rice also admits that the infrastructure at the heart of EBS was substantially undeveloped and had no hope of operating in the manner touted by EBS:

> We also falsely represented that EBS' fiber-optic network was superior and essentially complete. In reality, substantial portions of EBS' network were not operational and the network was not superior to those of our competitors. In addition, EBS' network did not operate as we publicly portrayed.

Id. Notably, Mr. Rice admits that EBS lied about the state of its network specifically to inflate Enron's stock price:

> The purpose in making these representations was to falsely portray to the investing public that EBS had a thriving telecommunications business that had successfully developed revolutionary software which would, in turn, cause Enron's stock price to increase significantly.

Id.

Indeed, EBS played a tremendous and undisputed role in the rise of Enron's common stock price in the beginning of 2000. To take just one example, on the day of and the

day following Enron's January 20, 2000 analyst conference on EBS, Enron's stock price rose from $54.40 to $71.69 - a 31.8% jump. *See* http://moneycentral.msn.com/investor/charts /chartdl.asp?Symbol=ENRNQ.

Now that Mr. Rice has pled guilty to securities fraud charges and admitted that he participated in fraudulent activity at EBS that inflated Enron's stock price, there is no longer any legitimate reason to protect him from civil discovery. The Court should lift the discovery stay to allow the Bank Defendants to take Mr. Rice's deposition. Mr. Rice possesses critical information and the Bank Defendants will be seriously prejudiced without its discovery. Given Mr. Rice's prominent role at EBS, alternative discovery obtained through documents and other Enron witnesses will not "effectively substitute" for the testimony of Mr. Rice himself. *Serafino*, 82 F.3d at 519. Indeed, Mr. Rice admits that factual recitation supporting his plea "does not include all of the facts known to me concerning criminal activity in which I and other members of Enron and EBS' senior management engaged." Plea Agreement, Ex. A ¶ 10. The Bank Defendants are entitled to discover these additional facts of wrongdoing from Mr. Rice through his deposition.

Discovery from Mr. Rice is further necessitated by his admission that he *and other Enron executives and employees* engaged in the fraudulent and illegal behavior. For example, Mr. Rice asserts, "I, together with others, conspired to falsely claim to investment analysts at Enron's January 20, 2000 analyst conference that EBS had developed revolutionary network control software" that did not, in fact, exist. *Id.* ¶ 5. The Bank Defendants' interest in learning the identities of Mr. Rice's co-conspirators is critical and cannot be postponed until some time near the end of the discovery period, when it would be too late to go back and re-

depose other EBS witnesses regarding Mr. Rice's testimony or to notice additional witnesses identified by him.

C. The Public's and Court's Interests

The "public interest in the integrity of securities market militates in favor of the efficient and expeditious prosecution of these civil litigations." *Arden Way*, 660 F. Supp. at 1500. In particular, the Fifth Circuit has noted that "protection of the efficient operation of the securities markets . . . from fraudulent . . . practices may require prompt civil enforcement which cannot await the outcome of a criminal investigation." *SEC v. First Fin. Group of Tex., Inc.*, 659 F.2d 660, 667 (5th Cir. 1981). The public interest is thus served by requiring the principal wrongdoers at Enron to submit to discovery in this action. Indeed, this Court recognized that "Plaintiff's and the public's interest in proceeding expeditiously in the civil actions is substantial." #1298 at 22.

It should be noted that when the Bank Defendants sought to postpone the commencement of depositions by ninety days because Enron and Arthur Andersen had failed to complete their document productions, the Court denied the motion noting that "[t]his case simply must stay on schedule." # 2172 at 3. The Court also recognized that the discovery schedule and the meticulous details of the Deposition Protocol "were the subject of months of negotiation and compromise by all parties." *Id.* Simply put, this case has reached the point where Mr. Rice should be made to participate in discovery.

D. Overlap of Issues

There is no dispute that the facts underlying Mr. Rice's civil and criminal proceedings overlap. *See, e.g.*, #1298 at 22 (noting that there is a "clear overlap of issues in the criminal and civil cases"). When Mr. Rice was subject to the Indictment, the factual overlap

raised the potential for self-incrimination, or alternatively his assertion of the Fifth Amendment, in the civil action. However, now that Mr. Rice has pled guilty to the same facts underlying his alleged liability in this case, thus eliminating the possibility for self-incrimination, the overlap of facts no longer supports a stay that prevents Mr. Rice from testifying about those facts.[6]

CONCLUSION

For the foregoing reasons, Bank Defendants respectfully request that the Court lift the stay and allow discovery to be obtained from Kenneth Rice.

Dated: August 31, 2004
Houston, Texas

Respectfully submitted,

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[6] Although additional counts of the Indictment remain pending against Mr. Rice, the government has agreed that it will dismiss the remaining charges and thus he is in no jeopardy of self-incrimination on those counts. Plea Agreement ¶ 10.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon all known counsel of record by electronic mail to the esl3624.com website on this 31st day of August, 2004.